Decision 16-05-054 May 26, 2016

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development of, California Renewables Portfolio Standard Program.	Rulemaking 15-02-020 (Filed February 26, 2015)

ORDER MODIFYING DECISION 15-12-025 AND DENYING REHEARING OF DECISION AS MODIFIED

I. INTRODUCTION

On January 21, 2016, San Diego Gas & Electric Company ("SDG&E") filed an application for rehearing of Decision (D.) 15-12-025 ("Decision").[1] The Decision accepts, with modifications, the draft Renewables Portfolio Standard ("RPS") Procurement Plans submitted by the major electric utilities, including SDG&E. It further directs the utilities to file their final 2015 RPS Procurement Plans in accord with the adopted schedule.

The holding at issue concerns over-generation by generators contracting with SDG&E, and what becomes of any excess energy generated beyond the contractual amount. The Decision approves the inclusion of SDG&E's generation cap proposals, and imposes a cap of 100% of the hourly contractual amount and 115% of the annual contractual amount of generation. (See Decision, at pp. 93-94.) Pursuant to SDG&E's proposal, SDG&E would pay nothing for any amount delivered above the generation cap

[1] All Commission decision citations refer to the official Commission pdf versions of the decisions, which can be found on the Commission's website: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

amount, and would receive the full value of any renewable energy credits ("RECs") for that excess generation. (SDG&E Draft 2015 RPS Proposal, August 4, 2015, App. 6, Model Power Purchase Agreement ("PPA"), § 4.2.) Although the Proposed Decision (PD) approved SDG&E's recommended generation caps, and specified that SDG&E need not pay for generation above those caps, it did not mention whether the sellers would have the option to sell any excess generation to other buyers. In response to comments from the Independent Energy Producers Association ("IEP"), the Decision specifies that the sellers may sell excess generation and associated RECs to third parties. (Decision, at pp. 112, 124, OP 7(6).)

In its application for rehearing SDG&E alleges: (1) the inclusion of the new holding ("OP 7(6)") allowing sales of generation to other parties may be inadvertent because it is not supported by discussion or findings; (2) the holding is inconsistent with other holdings in the Decision; (3) the holding is inconsistent with recent Commission precedent; (4) the holding is unsupported by the record; (5) OP 7(6) is unworkable; and (6) the inclusion of the holding after the PD violates Public Utilities Code section 1708[2] and due process.

The Office of Ratepayer Advocates ("ORA"), Southern California Edison ("Edison") and IEP filed responses to the application for rehearing. ORA and Edison support SDG&E's argument, and IEP opposes it.

We have carefully considered the arguments presented by SDG&E, and are of the opinion that grounds for rehearing have not been demonstrated. However, we will modify the Decision to clarify our reasoning. Rehearing of D.15-12-025, as modified in today's order, is denied.

[2] All section references are to the Public Utilities Code unless otherwise stated.

II. DISCUSSION

A. Adequacy of the Reasoning, the Findings and the Record

1. Inadvertence of OP 7(6)

SDG&E suggests that the inclusion of the new holding allowing sales of excess generation may have been inadvertent because it is "anomalous and unexplained." (SDG&E App. Rehg., at p. 7.) In support of this suggestion, SDG&E asserts that the conclusion is incompatible with other holdings in the Decision, and is not accompanied by discussion. SDG&E elaborates on these assertions in its other arguments.

The inclusion of the excess generation holding is not inadvertent. The Decision states that it agrees with IEP's comments on the PD suggesting that sellers should be able to sell excess generation to other buyers (Decision, at pp. 93-94), and modifies OP 7 to include this clear requirement. There is sufficient acknowledgement of the new holding in the Decision that it cannot be considered accidental.

2. Adequacy of Discussion and Findings

SDG&E argues that our decision to allow generators to sell excess generation to other buyers is not supported by adequate findings, as required by section 1757.1, or by separately stated findings, as required by section 1705. We agree that the Decision should state its reasoning more clearly.

After approving SDG&E's generation cap proposal and stating that facilities should be constructed to be consistent with contractual amounts, we stated, in response to comments on the PD, that we agreed with IEP that generators should be allowed to sell excess generation to other buyers. While we do not believe that these holdings are inconsistent with each other, we acknowledge that this is not necessarily clear from the discussion in the Decision. In summary, due to the stricter generation caps in SDG&E's proposal, and the fact that generators would receive no compensation for energy delivered above those caps, we believe it is fair to allow generators to sell that excess energy to third parties.

We will modify the Decision to clarify that although we adopt SDG&E's generation cap proposal, to the extent SDG&E contemplated that sales of excess energy

to third party sales would be foreclosed, those provisions are overruled. In addition, we will add language clarifying that we agree with IEP's argument that SDG&E could receive a windfall if the generation caps remain, and generators cannot sell to other buyers.

3. Consistency between OP 7(6) and Other Holdings and Discussion in the Decision

SDG&E takes issue with the fact that the Decision retains certain holdings from the PD that SDG&E claims are inconsistent with OP 7(6), allowing generators to sell excess generation to third parties. In particular, SDG&E identifies Finding of Fact ("FF") 8, and Conclusion of Law ("CL") 9, as well as the generation cap discussion in the PD.

Finding of Fact 8 provides, in relevant part, "If a seller would like to produce more energy, the seller is encouraged to offer a higher contract capacity during the bidding process." (Decision, at p. 120, FF 8.) Conclusion of Law 9 reads, "It is reasonable for the IOUs to modify their pro forma contracts consistent with SDG&E's suggested modification to the excess delivery provisions because the seller and utility agree on a contract quantity and expect the seller to construct a facility consistent with the terms of the contract." (Decision, at p. 121, CL 9, emphasis added.) The discussion within the Decision also contains the same concepts. (See Decision, at pp. 93-94.)

In short, we do not believe there is an inconsistency because there is no reason to conclude that allowing sales of excess generation to third parties will provide incentive to generators to overbuild or overproduce. If SDG&E believes this is not correct, we can revisit whether sales to third parties actually encourages any additional capacity or generation in future RPS proceedings. In any event, with the stricter generation caps SDG&E will not be impacted by any excess generation produced.

4. Consistency with Commission Precedent

SDG&E also argues that OP 7(6) is inconsistent with the *Re 2014 RPS Procurement* (2014) [D.14-11-042], where we approved generation caps and diminished compensation for excess deliveries for Edison. This argument is not correct.

In D.14-11-042, we held that the problem of excess deliveries should be handled by lowering the compensation to sellers for those excess deliveries over a certain cap. (See D.14-11-042, at pp. 35-38.) We adopted Edison's proposals that the seller be paid "CAISO revenues and costs," instead of 75% of the contract price for deliveries "in excess of 115% of the expected annual net energy production." (*Id*. at p. 35.) By contrast, SDG&E's generation cap proposal specifies that there is a cap of 100% of contract capacity on an hourly basis, 115% of annual contract capacity, and over that limit SDG&E owes zero dollars for excess generation delivered. (SDG&E Draft 2015 RPS Proposal, August 4, 2015, App. 6, Model PPA, art. 4, p. 45.)

SDG&E's current generation cap proposal is not the same as Edison's earlier proposal, and need not be treated identically. Our policies on handling excess generation have evolved as we deal with new cycles of RPS proposals. In D. 14-11-042, we held that excess generation should be handled by adopting a certain generation cap, and lowering the compensation over that amount. In considering the 2015 RPS plans, we continued to refine our approach. Accordingly, we approved SDG&E's proposal to lower the generation caps, and provided for no compensation from SDG&E for excess deliveries. In light of these changes, which made the generation caps stricter, we also allowed generators to sell excess energy to third parties. There is no inconsistency between the two decisions.

5. Consistency with the Record

SDG&E next suggests that OP 7(6) is inconsistent with the record. Specifically SDG&E challenges: (1) the fact that IEP presented the third party sales as an alternate proposal; (2) that the Decision does not address workability issues highlighted by IEP; and (3) that OP 7(6) is applicable only to SDG&E, when the generation caps apply to all IOUs. According to SDG&E, OP 7(6) bears little relationship to IEP's proposal.

SDG&E's main point lacks merit and it cites no authority regarding what type of record it believes is required. IEP clearly suggested third party sales as an

alternative to loosening the stricter generation caps, which the PD had clearly rejected. In this way, the Decision is directly responsive to IEP.

Furthermore, the record supports that the third party sales apply solely to SDG&E. IEP raised this suggestion concerning the PD's adoption of SDG&E's proposal, and had objected earlier to SDG&E's generation cap proposal, in particular. (See IEP August 31, 2015 Comments, at pp. 11-12.) SDG&E's proposal was not identical to the other utility proposals, and there is no requirement that they be handled identically. As SDG&E should be aware, the utility RPS proposals were considered individually in the RPS rulemaking.

In addition, as discussed below, the workability of allowing third party sales is not a "record" issue. Because we do not micromanage RPS procurement, it is up to SDG&E to determine the most beneficial way to carry out that directive.

B. Workability

One of SDG&E's main complaints is that the new provision, allowing sales of excess generation to third parties, is not workable. SDG&E claims there is no discussion of the numerous changes that would need to be made to the PPAs. In support, Edison further argues that is unclear whether the utility would relinquish its duties as scheduling coordinator. If the utility acts as scheduling coordinator, Edison argues it will have expenses for which there is no customer benefit. (Edison App. Rehg. Response, at p. 5.)

It is important to note that from the outset of the RPS program, it has been left to the utilities to develop the details of their RPS plans. As we stated when we were developing the RPS process:

> We do not, however, write any Plan, IRP [Integrated Resource Plan] or Supplement; dictate with precise detail the specific language of any Plan, IRP or Supplement; ***nor do we micro-manage*** what is in the Plan, IRP or Supplement. Rather, each utility has considerable flexibility to develop and propose its own Plan, IRP and Supplement. Our review is at a reasonably high level.

(*Re 2009 RPS* [D.09-06-018], § 3.2 at pp. 9-10 (emphasis added).)

SDG&E has not shown the provision is not workable. For the most part, SDG&E supports its argument with vague assertions such as the Decision fails to take into account, "many complex and controversial legal issues…." (SDG&E App. Rehg., at p. 14.) SDG&E's general argument that many changes to PPA would need to be made does not show that the holding is unworkable, since SDG&E is able to, and has, made changes to its proposed PPA.

SDG&E and Edison identify the following compliance issues which need to be addressed: (1) who is the scheduling coordinator; (2) whether additional costs will be incurred; (3) whether indemnification provisions are necessary; and (4) what provisions of the contract need to be modified. None of these issues that need to be resolved indicate that allowing third party sales is unworkable, or that the Decision is deficient. These are simply details that are left for SDG&E to work out.

If there is some reason that the third party sales provision turns out to be truly unworkable, SDG&E can always return with the specific support and file a petition to modify the Decision. Short of that, if the provision does not work well, or results in inefficiencies or higher utility costs, these can always be specifically presented and considered in future RPS cycles. The next RPS cycle will begin shortly, and there is no indication that SDG&E is even procuring any energy pursuant to the newly approved contractual provisions. As with all new RPS provisions, the third party sales provision can be revised in subsequent cycles if there is a better option.

C. Due Process

SDG&E alleges that the adoption of OP 7(6) at the end of the RPS proceeding violates due process and section 1708. According to SDG&E, we failed to provide notice and an opportunity to be heard concerning our changes to the PD.

SDG&E also contends that we violated section 1708 by including OP 7(6). SDG&E fails to demonstrate that we violated its due process rights.

Contrary to SDG&E's assertion, section 1708 does not apply to OP 7(6). Section 1708 provides, "The commission may at any time, upon notice to the parties, and

with an opportunity to be heard… rescind, alter, or amend any order or decision made by it." Although SDG&E claims it lacked notice and an opportunity to be heard, section 1708 applies only to changes from final orders or final Commission decisions, and not to changes from the PDs.

To the extent SDG&E is suggesting that OP 7(6) is a change to D.14-11-042, that argument also lacks merit. D.14-11-042 concerned an earlier RPS cycle, and therefore the holdings in that decision do not apply to the RPS proposals now at issue. Rather than altering or amending any decision, we adopted new holdings to apply to the new RPS cycle at issue. Moreover, the entire proceeding provides notice that the consideration and adoption of further refinements to the RPS procurement process are the goals of the proceeding.

SDG&E also fails to develop its Constitutional due process argument. Rulemakings have fewer due process implications. (See *Wood v. Public Utilities Com.* (1971) 4 Cal.3d 288.) In any event, there was notice and an opportunity to be heard regarding the stricter generation caps and how they would be handled. More specifically, SDG&E had an opportunity to comment on the third party sales after IEP suggested the proposal in its comments on the PD.

III. CONCLUSION

For the above reasons, we will modify the Decision to more clearly outline our reasoning for allowing sales to third parties of excess generation. Rehearing of D.15-12-025, as modified, is denied.

Therefore **IT IS ORDERED** that:

1. The first sentence of the paragraph beginning on seventh line of page 94 of D.15-12-025 is deleted and replaced with the following:

> This decision approves SDG&E's proposal that that there be a cap of 100% of contract capacity on an hourly basis, 115% of annual contract capacity, and over that limit SDG&E owes zero dollars for excess generation delivered. (SDG&E Draft 2015 RPS Proposal, August 4, 2015, App. 6, Model PPA, art. 4, p. 45.)

2. The following sentence is added at the end of the first full paragraph on page 94 of D.15-12-025: "We note that SDG&E is proposing stricter generation cap limitations than we adopted in D.14-11-042."

3. The following discussion is inserted after the first full paragraph on page 94 of D.15-12-025:

> Although we adopt SDG&E's recommendations concerning the stricter generation caps for energy deliveries to SDG&E, we also recognize, as IEP notes, the potential for the new generation cap policy to result in a windfall to SDG&E at the expense of the generators. For this reason, we direct SDG&E to modify its PPAs to expressly allow generators to sell excess energy and associated RECs to third parties. To the extent that any provisions of SDG&E's proposal are inconsistent with allowing third party sales, those provisions should be modified.
>
> We believe that allowing sales of excess generation will at most have a minor impact to the amount of statewide generation. Moreover, because of the strict generation caps for sales to SDG&E, SDG&E will not be harmed by any excess generation produced. We recognize that this is a new policy, and we note that the Commission's guidelines concerning RPS procurement are continually developing. While we foresee no major problems, we will review the third party sales policy during our next RPS review.

4. Finding of Fact 12 is added on page 120 of D.15-12-025 as follows:

> 12. Because, under SDG&E's proposal, generators will receive no compensation for energy delivered above the contractual generation caps, it is possible that SDG&E could receive a "windfall" in terms of receiving free energy.

5. Conclusion of Law 13 is added on page 122 of D.15-12-025 as follows:

> 13. Due to the potential for uncompensated energy deliveries to SDG&E based on its stricter generation cap proposal, it is reasonable to allow generators to sell excess generation to third parties.

6. Rehearing of D.15-12-025, as modified herein, is denied.

This order is effective today.

Dated May 26, 2016, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE M. RANDOLPH
Commissioners